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Melissa Stewart

University of Miami School of Law

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Buyer Beware: Who Is Paying the Home Buyer's Real Estate Agent?

Melissa Stewart

Within the past few years, unprecedented class action lawsuits have been filed against the National Association of Realtors ("NAR") and major real estate brokerage firms that could have multibillion-dollar implications to homeowners across the United States. One lawsuit claims that NAR rules requiring home sellers' brokers ("seller-broker") to offer home buyers' brokers' ("buyer-broker") compensation when listing a property on a local database of properties for sale called the Multiple Listing Service ("MLS") have driven up costs to the seller and discouraged competition, violating the Sherman Antitrust Act. This commission structure has been upheld in the courts before, but the real estate industry has changed over the years. Technology has had the biggest impact on the real estate industry in recent years. Technology has caused real estate agents' services to become more expedited and efficient. For example, buyers now have the ability to find property on their own due to real estate websites.

Technology like the MLS and current real estate commission rules have been blamed for setting a standard commission that has inflated real estate costs, causing stifled negotiations in real estate transactions and triggering steering of clients to properties with the highest commissions for the real estate agents. However, NAR argues just the opposite of this. NAR contends that its rules and enforcement of its rules on the MLS provide sellers with an increased opportunity to sell their homes by marketing it on an industry-wide platform.

The verdicts of pending recent lawsuits will not just be felt by the defendants whom could find themselves potentially liable for millions of dollars. These verdicts will have a historic impact on

the entire real estate industry and all American homeowners by changing the way real estate transactions have been conducted in the United States for years. If buyers had to pay their brokers' real estate commissions, this would discourage buyers from attaining real estate agents, which could lead to buyers entering into one of the biggest purchase of their life without a professional, potentially leading to more lawsuits.

Consequently, even though sellers have various options when selling their home that do not force a standard real estate commission for the seller-broker and buyer-broker, how could current commission structures violate an act meant to prohibit restraints on trade? Although many homeowners argue that in today's modern era buyers should pay the buyer-broker commission, this Comment explores why having sellers pay the buyer-broker commission is beneficial and supported from an antitrust, economic, and equitable perspective.

I. INTRODUCTION

Few things are more stressful yet rewarding in Americans' lives than buying and selling a home. The buying process comes with the anxieties of choosing the right home, receiving approval for financing, and perhaps selling a previous home. The selling process comes with the worries of listing a home for the right price, having successful inspections, and paying real estate commissions—even for the buyer-broker.

For most Americans, purchasing a home is the biggest purchase of their life, and the real estate market is gigantic in the United States, at a total value of \$27.2 trillion as of 2019, which is around \$3 trillion behind the value of the United States stock market.¹ Thus, the rules governing real estate transactions are vital. A chief principle in real estate transactions in the United States is that the seller pays for both his or her real estate broker's commission *and* the buyer-broker's commission. NAR refers to this rule as "Rule 2-G-1" under its Handbook on Multiple Listing Policy,²

¹ Spencer White & Julian Hebron, *Size of U.S. residential real estate market is \$27 trillion in 2019*, THE BASIS POINT (Apr. 29, 2019), <https://thebasispoint.com/size-u-s-residential-real-estate-market-27-trillion-in-2019/>.

² NAT'L ASS'N OF REALTORS®, HANDBOOK ON MULTIPLE LISTING POL'Y, at 34 (28th ed. 2016), <https://www.nar.realtor/sites/default/files/policies/2016/2016-MLS-Handbook.pdf>.

but many others (and this Comment) simply refer to this rule as the “Buyer–Broker Commission Rule.”

However, sellers having to pay the commission of a broker that does not represent them—and a broker they perhaps have never met—has been challenged for many years and has long been upheld. Yet, one recent class action lawsuit likely has the best chance to create change in the current broker commission rules. This lawsuit challenges the antitrust implications of current broker commission structures.³ The outcome of this case could dramatically change the real estate industry. However, is there a legal basis for changing the current broker commission rules?

This Comment will discuss antitrust, economic, and equitable arguments in favor of both eliminating and keeping the Buyer–Broker Commission Rule, many of which are relevant in lawsuits against NAR, before concluding that the Buyer–Broker Commission Rule should be considered equitable and legal under antitrust law. Specifically, Part II gives a background of the NAR, explains how broker commissions are structured in the United States, and previews the lawsuit mentioned against NAR involving the legality of the current broker commission structure in the United States. Part III reviews NAR commission rules from the mid–1900s to the present and examines how the rules have been challenged under the Sherman Antitrust Act. Part IV explores the arguments for why the Buyer–Broker Commission Rule should be changed, and Part V examines the arguments for why the Buyer–Broker Commission Rule should be upheld. Finally, Part VI discusses what the future of real estate commissions should look like and decides that the Buyer–Broker Commission Rule should remain, highlighting the consequences if this rule is abolished while also making suggestions for reform in the real estate industry. Lastly, Part VII gives a conclusion of this Comment.

II. BACKGROUND

a. The National Association of Realtors

NAR is America’s largest trade association, representing 1.4 million members, including NAR’s institutes, societies, and councils, involved in all aspects of the residential and commercial real estate industries.⁴ Membership includes residential and commercial brokers.⁵ The term REALTOR® is a registered collective membership mark that identifies a

³ See generally *Moehrl v. Nat’l Ass’n of Realtors*, 492 F. Supp. 3d 768 (N.D. Ill. 2020).

⁴ About NAR, NAT’L ASS’N OF REALTORS, [https:// www.nar.realtor/about-nar](https://www.nar.realtor/about-nar) (last visited Oct. 18, 2020).

⁵ *Id.*

real estate professional who is a member of NAR and subscribes to its strict Code of Ethics.⁶ NAR's Code of Ethics was one of the first codifications for ethical duties mandated by a business group and helps further clients' best interests by enforcing cooperation among REALTORS®.⁷

b. Real Estate Broker Commissions

For several decades, real estate agents' pay structure in the United States has typically been on a commission basis, and the commission is either a percentage of the sale price of the property or a dollar amount.⁸ Commissions are not paid directly to the real estate agent.⁹ Rather, commissions are paid to the agents' respective brokers because real estate agents must work under a brokerage firm, whom then pays the agents their share of the commission, often minus fees and costs.¹⁰ The standard practice is that the seller pays the real estate commission of both the seller-broker and the buyer-broker.¹¹ So according to Section 2-G-1 of NAR's Handbook on Multiple Listing Policy, the buyer does not pay the commission to his or her broker, and the seller will specify in the listing agreement the total commission to be paid to the seller-broker "with the expectation that a position of the commission will be paid to the buyer-broker."¹²

Typically, the commission is split evenly between the two brokers, but this is negotiable.¹³ Thus, if the commission in place for a real estate transaction is six percent, which is around average for real estate commissions in the United States,¹⁴ the seller-broker and the buyer-broker would each receive three percent of the property value from the

⁶ *Id.*

⁷ *The Code of Ethics*, NAT'L ASS'N OF REALTORS, <https://www.nar.realtor/about-nar/governing-documents/the-code-of-ethics> (last visited Jan. 11, 2020).

⁸ James Kimmons, *Real Estate Agent Comm'n Structures and Comp.*, THE BALANCE SMALL BUS. (Nov. 11, 2019), <https://www.thebalancesmb.com/commissions-structure-compensation-2866662>.

⁹ Tara Struyk, *Who Pays Real Estate Fees?*, INVESTOPEDIA (Dec. 31, 2019), <https://www.investopedia.com/financial-edge/0611/understanding-real-estate-commissions-who-pays.aspx>.

¹⁰ *Id.*

¹¹ Audrey Ference, *Who Pays the Real Estate Agent When You Buy or Sell a Home?*, REALTOR.COM (Aug. 22, 2017), <https://www.realtor.com/advice/buy/who-pays-the-real-estate-agent/>.

¹² Order at 2, *Moehrl v. Nat'l Ass'n of Realtors*, 492 F. Supp. 3d 768 (N.D. Ill. 2020) (No. 1:19-cv-01610); NAT'L ASS'N OF REALTORS®, *supra* note 2, at 34.

¹³ *See generally* Kimmons, *supra* note 8.

¹⁴ *Average comm'n rate for real estate agents in the United States between 1992 and 2019*, STATISTA (Nov. 6, 2020), <https://www.statista.com/statistics/777612/average-commission-rate-realtors-usa/>.

seller.¹⁵ However, while sellers pay the broker commissions, they usually wrap them into the price of the home, so one could say that, in that sense, the buyer pays part of the fees.¹⁶

One might wonder why the obligation to pay the buyer–broker was placed on the seller in the first place. This relates back to the history of the role of real estate agents and broker compensation. Prior to the 1990s, brokers involved in a real estate transaction represented the seller, and there was the seller–broker and the “subagent” of the seller–broker.¹⁷ The subagent would work solely with the buyers; however, the subagent owed a fiduciary duty to the sellers and had to represent the sellers’ best interests.¹⁸ Thus, the seller would compensate the seller–broker with a commission, and the seller–broker would compensate the subagent for his or her work with the buyer.¹⁹ This system was eventually removed because having a real estate agent represent the buyer but owe fiduciary duties to the seller had obvious conflicts and complications, but this helps explain why sellers have always paid the buyer–broker.²⁰

Additionally, NAR adopts in its Handbook on Multiple Listing Policy the Buyer–Broker Commission Rule that requires all brokers to make a blanket, unilateral offer of compensation to the buyer–broker in order to participate in the MLS.²¹ Moreover, NAR rules do not allow a listing to be published on a MLS unless the published listing includes an offer of compensation.²² The MLS is a joint venture among brokers to administer the sharing of information about properties in a certain geographic area.²³

¹⁵ See generally Kimmons, *supra* note 8.

¹⁶ Mark S. Nadel, *A Critical Assessment of the Traditional Residential Real Estate Broker Comm’n Rate Structure (Unabridged)*, CORNELL UNIVERSITY LIBRARY (July 07, 2006), <https://ecommons.cornell.edu/handle/1813/70631>; See Ference, *supra* note 11.

¹⁷ Matt Carter, *From subagency to non-agency: a history*, INMAN (Feb. 17, 2012), <https://www.inman.com/2012/02/17/from-subagency-non-agency-a-history/>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See generally *Handbook on Multiple Listing Policy, Comm’n/Cooperative Comp. Offers, Section I: Info. Specifying the Comp. on Each Listing Filed with a Multiple Listing Service of an Ass’n of REALTORS® (Policy Statement 7.23)*, NAT’L ASS’N OF REALTORS (Jan. 1, 2021).

²² *Id.*

²³ U.S. DEP’T OF JUST., BACKGROUND Q&A: NAT’L ASS’N OF REALTORS® 1, <https://www.justice.gov/opa/press-release/file/1338606/download> (last visited Sept. 23, 2021).

c. *Christopher Moehrl, et al. v. National Association of Realtors*

Moehrl, et al. v. National Association of Realtors is the case that has recently come to the forefront in challenging the current structure and laws of real estate broker commissions.²⁴ An amended class action complaint filed on March 16, 2019, in the Northern District of Illinois consolidated cases filed by Christopher Moehrl, a Minnesota-based home seller, and Sawbill Strategic, a Minnesota company, in March and April 2019, respectively, while adding six more plaintiffs from across the country.²⁵ The Consolidated Amended Class Action Complaint (“CAC”) targets NAR and the following prominent real estate brokerages: Realogy Holdings Corp., HomeServices of America, Inc., HSF Affiliates, LLC, Long & Foster Companies, Inc., BHH Affiliates, LLC, RE/MAX LLC, and Keller Williams Realty, Inc.²⁶ On October 10, 2019, the United States Department of Justice filed a statement of interest in this lawsuit.²⁷

This lawsuit focuses on the Buyer–Broker Commission Rule requiring brokers to offer the buyer–broker compensation when listing a property on a multiple listing service.²⁸ As stated by NAR, the compensation is a “private offer of cooperation and compensation by listing brokers to other real estate brokers.”²⁹ The seven individual plaintiffs sold their homes that were listed on a MLS.³⁰ Thus, as a requirement of listing their homes for sale on the MLS, each plaintiff was required to include in his or her listing a set offer of compensation to any broker who found a buyer for the plaintiff’s home—the buyer–broker.³¹ The plaintiffs consequently paid the respective buyer–broker the commission listed on the MLS upon the sale of their homes.³²

The plaintiffs allege that the “Buyer–Broker Commission Rule,” is anticompetitive and resulted in them paying artificially inflated, supracompetitive commission rates.³³ Furthermore, they contend in their CAC that the Buyer–Broker Commission Rule “creates tremendous pressure on sellers to offer a high commission that has long been

²⁴ See generally *Moehrl v. Nat’l Ass’n of Realtors*, 492 F. Supp. 3d 768 (N.D. Ill. 2020).

²⁵ See generally Consolidated Amended Class Action Complaint, *Moehrl*, 492 F. Supp. 3d (2019) (No. 1:19-cv-01610).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Multiple Listing Service (MLS): What Is It*, NAT’L ASS’N OF REALTORS, <https://www.nar.realtor/nar-doj-settlement/multiple-listing-service-mls-what-is-it> (last visited Dec. 19, 2020).

³⁰ See Consolidated Amended Class Action Complaint, *Moehrl*, 492 F. Supp. 3d (2019).

³¹ *Moehrl v. Nat’l Ass’n of Realtors*, 492 F. Supp. 3d 768, 773 (N.D. Ill. 2020).

³² *Id.*

³³ *Id.*

maintained in this industry so that buyer–brokers will not ‘steer’ buyers to properties offering higher buyer–broker commissions.”³⁴ They argue that the defendants created a restraint on trade in violation of Section 1 the Sherman Antitrust Act by “agreeing, combining and conspiring to impose, implement and enforce anticompetitive restraints that cause home sellers to pay inflated commissions on the sale of their homes.”³⁵ In other words, the plaintiffs allege that the defendants conspired to require home sellers to pay the buyer–broker—at an inflated amount—in violation of federal antitrust law.³⁶ The proposed class would cover any home seller across various regions of the United States whom paid a buyer–broker commission in connection with the sale of a property listed on one of twenty MLSs within four years prior to the initiation of *Moehrl*.³⁷ The plaintiffs are seeking for homebuyers to be the ones to pay their brokers rather than sellers.³⁸

The defendants filed motions to dismiss in response to the CAC.³⁹ In her Order dated October 2, 2020, U.S. District Judge Andrea Wood found if it were not for NAR’s rules requiring home sellers to make a blanket, unilateral offer of compensation to any broker who finds a buyer for a home—regardless of that broker’s experience or the value of services that the broker provides to the buyer—and for the corporate defendants’ requirements that their franchisees follow NAR’s rules, “each plaintiff would have paid substantially lower commissions.”⁴⁰ Thus, the defendants’ motions to dismiss were denied, allowing the plaintiffs’ antitrust claims to proceed.⁴¹

³⁴ *Id.*

³⁵ *Class action cases over broker commissions pick up steam*, THE REAL DEAL (Jun. 18, 2019), <https://therealdeal.com/national/2019/06/18/class-action-cases-over-broker-commissions-pick-up-steam/>.

³⁶ *See Moehrl v. National Association of Realtors, et al.*, COHEN MILSTEIN, <https://www.cohenmilstein.com/case-study/moehrl-v-national-association-realtors-et-al> (last visited Dec. 21, 2020).

³⁷ *See Consolidated Amended Class Action Complaint, Moehrl v. Nat’l Ass’n of Realtors*, 492 F. Supp. 3d 768 (N.D. Ill. 2020) (No. 1:19-cv-01610).

³⁸ *See Id.*; Andrea V. Brambila, *A commission suit with a twist: It’s the buyers who are getting screwed*, INMAN (Jan. 29, 2021), <https://www.inman.com/2021/01/29/a-commission-suit-with-a-twist-its-the-buyers-who-are-getting-screwed/>.

³⁹ *See Consolidated Amended Class Action Complaint at 4, Moehrl*, 492 F. Supp. 3d (No. 1:19-cv-01610).

⁴⁰ Andrea V. Brambila, *‘Paradigm shift’: Realtors weigh in on the buyer commission lawsuit*, INMAN (Oct. 6, 2020), <https://www.inman.com/2020/10/06/paradigm-shift-realtors-weigh-in-on-the-buyer-commission-lawsuit/>.

⁴¹ *See generally Consolidated Amended Class Action Complaint at 11, Moehrl*, 492 F. Supp. 3d (No. 1:19-cv-01610).

III. HISTORY OF REAL ESTATE COMMISSIONS

To better understand the claims of the currently pending case against NAR and some of the world's most prominent real estate brokerage companies, it is first helpful to understand the history of real estate broker commissions and their challenges in the legal system as the commission rules relate to antitrust law.

a. NAR Rules Then and Now

NAR has significantly changed its rules over the decades, leading to substantial changes in the real estate industry. Before the 1950s, broker commission rates were historically fixed under NAR.⁴² In 1950, NAR's Code of Ethics stated that "every Realtor . . . should maintain the standard rates of commission adopted by the board and no business should be solicited at lower rates."⁴³ A 1950 Supreme Court decision found that this price-fixing rule was in violation of antitrust laws.⁴⁴ Local realtor boards in the past encouraged members to set six percent rates and interpreted price cutting as unethical behavior, but an outburst of criminal and civil antitrust suits beginning in the early 1970's forced NAR and its local boards to not even encourage a fixed brokerage rate on residential sales.⁴⁵ NAR did not officially adopt a "hands off" policy regarding real estate broker commissions until 1971.⁴⁶ Yet, throughout the years, many homeowners have still claimed that the "hands off" policy of NAR is not so "hands off."

In 1980, the Department of Housing and Urban Development released the results of its Comprehensive 1979 National Survey based upon 18,000 Uniform Settlement Statements from institutional lenders and detailed analysis of eight major cities, and the results concluded that: "(1) of the 83 percent of sellers who used brokers, 94 percent of them used full service brokers, and (2) commission rates tended to be exactly six or seven percent across significantly different market conditions."⁴⁷ This suggested that commission rates were not determined within a competitive market setting, especially coupled with the idea that past broker organizations tried to fix commission rates.⁴⁸ However, the average broker commission

⁴² William C. Erxleben, *In Search of Price and Service Competition in Residential Real Estate Brokerage: Breaking the Cartel*, 56 WASH. L. REV. 179, 187 (1981).

⁴³ Nadel, *supra* note 16, at 50 (citing U.S. v. Nat'l Ass'n of Real Estate Bds., 339 U.S. 485, 488, 494-95 (1950)).

⁴⁴ See generally Nat'l Ass'n of Real Estate Bds., 339 U.S. at 488 (1950).

⁴⁵ See Nadel, *supra* note 16.

⁴⁶ *Id.*

⁴⁷ See Erxleben, *supra* note 42.

⁴⁸ *Id.*

has gone down in the United States over the years.⁴⁹ The average broker commission has dropped from 6.04% in 1992 to 5.7% in 2019.⁵⁰

b. Real Estate Commissions as They Relate to Antitrust Law: The Sherman Antitrust Act

The Sherman Antitrust Act was the first federal act that outlawed monopolistic business practices and activities that restrict interstate commerce and competition in the marketplace.⁵¹ The Sherman Antitrust Act is based on the principle that unrestrained interaction of competitive forces will create the best use of economic resources, the highest quality, and the lowest prices.⁵² To bring a claim under Section 1 of the Sherman Act, the plaintiff must assert the following: “(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in a relevant market; and (3) an accompanying injury.”⁵³ Once a court determines that a trade practice is unreasonably restricting trade, federal and several state courts have affirmative duties and remedial powers to restore competitive conditions.⁵⁴ The plaintiffs in these lawsuits must plead facts supporting violations of anticompetitive behavior by the defendant(s) with particularity.⁵⁵

In regard to real estate broker commission rates, this would mean that real estate brokerages are not allowed to agree on the commission rate that each will charge.⁵⁶ Since the 1980s, there has been a copious amount of lawsuits that have tried to support fairness to buyers and sellers in real estate transactions, and the Federal Trade Commission has challenged various anticompetitive practices present in the real estate industry.⁵⁷ For example, in July 2006, the Federal Trade Commission charged the Austin Board of Realtors, which is an association of real estate brokers in Austin,

⁴⁹ *Average commission rate for real estate agents in the United States between 1992 and 2019*, STATISTA (Nov. 6, 2020), <https://www.statista.com/statistics/777612/average-commission-rate-realtors-usa/>.

⁵⁰ *Id.*

⁵¹ *Sherman Anti-Trust Act (1890)*, [www.OURDOCUMENTS.GOV](http://www.ourdocuments.gov), <https://www.ourdocuments.gov/doc.php?flash=false&doc=51> (last visited Oct. 23, 2020); *See generally Sherman Antitrust Act*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/sherman_antitrust_act (last visited Jan. 3, 2021).

⁵² *See* N. Pac. Ry. Co. v. U.S., 356 U.S. 1, 4 (1958).

⁵³ *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 335 (7th Cir. 2012).

⁵⁴ *Brambila*, *supra* note 40.

⁵⁵ *Andrea V. Brambila, Realty Beats Back Commission Fraud Lawsuit From Investors*, INMAN (Feb. 2, 2021), <https://www.inman.com/2021/02/02/realty-beats-back-commission-fraud-lawsuit-from-investors/>.

⁵⁶ *Antitrust*, NATIONAL ASSOCIATION OF REALTORS, <https://www.nar.realtor/antitrust> (last visited Dec. 26, 2020).

⁵⁷ *See* William Blumenthal, *A Primer on the Application of Antitrust Law to the Professions in the United States*, 144 ATRCOUN ARTICLE I (2006).

Texas, with violating federal antitrust law for adopting rules that effectively thwart “consumers with nontraditional lower-cost real estate listing agreements from marketing their listings on important public Web sites.”⁵⁸ More recent challenges to real estate broker commissions under antitrust law include *Bauman, et al. v. MLS Property Information Network, Inc., et al.*, which is a class-action-seeking lawsuit filed on behalf of two Connecticut homeowners in June 2020 alleging that the Buyer-Broker Commission Rule has inflated buyer-broker commissions and resulted in anticompetitive restraints,⁵⁹ and *Leeder v. The National Association of Realtors et al.*, where the plaintiffs contend that local real estate associations and MLSs are co-conspirators for implementing the Buyer-Broker Commission Rule which severely restricts buyers’ abilities to modify the buyer-brokers’ commissions.⁶⁰ There is certainly a movement for change in the real estate industry, as evidenced by lawsuits like these, but dramatic changes to broker commission structures have yet to be supported by courts under antitrust law, so the real estate industry is focused on *Bauman*, *Leeder*, and of course, *Moehrl*.

IV. ARGUMENTS FOR WHY THE COMMISSION RULES SHOULD BE CHANGED

There are many compelling arguments to inspire development and change (perhaps even modernization) in the way real estate agents and brokers should be paid a commission in the United States.

a. Antitrust

The antitrust arguments in support of changes to real estate commissions must be analyzed when considering the momentum of cases like *Moehrl* that filed in the United States. The main restraint that *Moehrl* and a movement of recent lawsuits highlight is that NAR Buyer-Broker Commission Rule requires listing brokers to make a “blanket unilateral offer of compensation” to buyer-brokers when listing a property in a Realtor-affiliated MLS—to the benefit of NAR and major real estate

⁵⁸ *Id.* at 9.

⁵⁹ Class Action Complaint at 1, *Bauman v. MLS Prop. Info. Network, Inc.*, No. 1:20-cv-12244 (D. Mass. Dec. 17, 2020) (“seller must offer a set commission to the successful buyerbroker in order for their property to be listed on Pinergy is anticompetitive and causes sellers to pay artificially inflated, supra-competitive commission rates.”).

⁶⁰ See Class Action Complaint at 9, *Leeder v. The Nat’l Ass’n. of Realtors*, No. 1:21-cv-00430 (N.D. Ill. Jan. 25, 2021); see also Andrea V. Brambila, *A Commission Suit with a Twist: It’s the Buyers Who are Getting Screwed*, INMAN (Jan. 29, 2021), <https://www.inman.com/2021/01/29/a-commission-suit-with-a-twist-its-the-buyers-who-are-getting-screwed/>.

brokerages—by imposing supracompetitive charges to sellers and stifling competition from cheaper alternatives for buyers and sellers.⁶¹ This rule can be seen as anticompetitive and therefore restraining on the real estate market because it forces the seller's broker to post an offer of compensation (either a percentage of the commission or a dollar amount) on the MLS rather than accepting invitations to discuss the conditions of the brokerage commissions with potential seller-brokers as a condition of listing a property on the MLS.⁶² Consequently, this can lead sellers to offer high commission rates in order to be able to compete with the competition of getting buyer-brokers' attention to show the seller's property to their respective clients. However, one could argue, as the defendants in *Moehrl* have, that this is what happens in a free market; sellers want to sell their property, so they are willing to offer the highest commissions even though NAR technically allows commissions to be offered at the most minimal amount of even a penny.⁶³ But is this really practical? Is this really procompetitive? Certainly, a property listed with a commission of a penny would be less enticing than a property with a six percent commission for a buyer-broker to suggest to his or her client, and Judge Andrea R. Wood of the North District of Illinois agrees with this argument.⁶⁴

Furthermore, many support that the commission rules should be changed because they can create barriers to entry, which is an anticompetitive effect. It would be difficult for a new listing service that requires the buyer to pay the buyer-broker to succeed if the current commission rules are still in place.⁶⁵ There are already around 1,000 MLSs in the United States, eighty percent of which are controlled by NAR state and local member boards,⁶⁶ and according to a NAR 2006 survey, eighty-eight percent of sellers reported that their home was listed on a MLS.⁶⁷ When there is a database this massive in the real estate market, it is going to be difficult for a new competitor to enter the market regardless.

⁶¹ See Consolidated Amended Class Action Complaint at 13, *Moehrl v. Nat'l Ass'n of Realtors*, Civil Action No. 1:19-cv-01610 (N.D. Ill. Jun. 14, 2019).

⁶² *Id.* at 3.

⁶³ See *id.*

⁶⁴ See Memorandum and Order, *Moehrl, et al. v. National Ass'n of Realtors, et al*, Civil Action No. 1:19-cv-01610 (N.D. Ill. Oct. 2, 2020) ("Common sense suggests that a buyer-broker is highly unlikely to show their client a home when the seller is offering a penny in commission.").

⁶⁵ See *id.*

⁶⁶ See Amended Complaint at 5, *United States v. Nat'l Ass'n of Realtors*, No. 05C-5140 (N.D. Ill. Oct. 4, 2005).

⁶⁷ U.S. Dep't of Just. & F.T.C., *Competition in the Real Estate Brokerage Industry: A Report by the Federal Trade Commission and the U.S. Department of Justice*, FEDERAL TRADE COMMISSION (Apr. 2007), <https://www.ftc.gov/sites/default/files/documents/report-s/competition-real-estate-brokerage-industry-report-federal-trade-commission-and-u.s.department-justice/v050015.pdf>

However, if that new competitor were to challenge the current listing structure and require that buyers pay the buyer–broker commissions, it would appear extremely restraining.⁶⁸ A buyer will likely be disinclined to retain a broker who utilizes a database where the buyer pays the buyer–broker when there are other buyer–brokers who are compensated by the seller under the current MLS structure, and, thus, this would cause sellers to be reluctant to list their properties on a database that was not attracting buyers–brokers and their clients.⁶⁹ Consequently, courts could likely find that NAR Buyer–Broker Commission Rule is in violation of the Sherman Act by requiring that real estate agents follow it in order to gain access to the “primary source of home listing information” in the United States.⁷⁰

b. Inflated Commissions

Secondly, a reason that many support change in current real estate commission rules is that they arguably inflate broker commissions. According to the plaintiffs in *Moehrl*, commissions are inflated because buyers should be the ones to pay their brokers’ commissions, which would result in buyers competing to get clients’ business by offering services at a lower price.⁷¹ The buyer would then be paying less in commissions, and so would the seller because the seller is no longer paying for the buyer–broker commission. By the end of 2019, the average sales price of houses sold in the United States was \$384,600.⁷² Taking the average real estate broker commission in 2019 of 5.7%,⁷³ and assuming that the seller pays half of this (2.85%) to the buyer–broker, this means that with the average home sales price and commission in 2019, sellers were paying an extra \$10,961.10 that they would not be paying if the buyer was the one required to compensate the buyer–broker. Overcharges like this have caused economists to believe that “more than half of the current real estate commissions might be eliminated by competition,” leading to estimates of \$30 billion in savings in broker fees for consumers.⁷⁴ This is especially concerning in an industry where brokers are compensated unrelated to

⁶⁸ See Consolidated Amended Class Action Complaint at 19-20, *Moehrl*, No. 1:19-cv-01610.

⁶⁹ *Id.*

⁷⁰ U.S. Dep’t of Just. & F.T.C., *supra* note 67.

⁷¹ See Consolidated Amended Class Action Complaint at 17-18, *Moehrl*, No. 1:19-cv-01610.

⁷² *Average Sales Price of Houses Sold for the U.S.*, FRED ECONOMIC DATA, <https://fred.stlouisfed.org/series/ASPUS> (last visited Jan. 28, 2021).

⁷³ STATISTA, *supra* note 14.

⁷⁴ Consolidated Amended Class Action Complaint at 60-61, *Moehrl*, No. 1:19-cv-01610.

their level of experience or amount of time rendered on a transaction.⁷⁵ Lastly, buyer–brokers could be motivated to encourage their buyers to pay higher prices because this would give the buyer–brokers higher commissions.

c. Steering

A third concern about the current commission structure for many consumers is that it leads to buyer–brokers “steering” properties shown to their clients. Because there is a blanket offer made on the MLS for each property, buyer–brokers can compare commissions for properties, which can result in the brokers steering their clients toward the properties which offer the highest commissions.⁷⁶ One study analyzed around 650,000 residential listings in eastern Massachusetts from 1988 to 2011 and found that the properties listed with a lower commission were five percent less likely to sell and took twelve percent longer to sell.⁷⁷ This data “reflect[s] decreased willingness of buyers’ agents to intermeditate low commission properties (steering).”⁷⁸ To add to the concern of steering, it is challenging for buyers to confirm that their agent is not steering them because they do not have access to the MLS, so they cannot see the commissions of all the properties that their broker is suggesting to them.⁷⁹

d. Negotiation

Next, broker commission structures should be reformed because they can arguably hinder the negotiation process, which generates unequitable, inflated commissions. Under NAR Standard of Practice 3–2, after the seller receives a purchase offer from a buyer, the seller–broker cannot unilaterally change the buyer–broker’s commission that was presented on the MLS.⁸⁰ Thus, the plaintiffs in *Moehrl* state that “a seller cannot respond to a purchase offer with a counteroffer that is conditional on reducing the buyer–broker commission.”⁸¹ Also, under NAR Standard of Practice 16–16, buyer–brokers are prohibited from reducing their commission offered

⁷⁵ Andrea V. Brambila, *A Commission Suit with a Twist: It’s the Buyers Who are Getting Screwed*, INMAN (Jan. 29, 2021), <https://www.inman.com/2021/01/29/a-commission-suit-with-a-twist-its-the-buyers-who-are-getting-screwed/>.

⁷⁶ See generally Panle Jia Barwick & Parag A. Pathak, *Conflicts of Interest and Steering in Residential Brokerage*, 9 AM. ECON. J.: APPLIED ECON. 191, 222 (July 2017).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Consolidated Amended Class Action Complaint at 6, *Moehrl*, No. 1:19-cv-01610.

⁸⁰ 2021 Code of Ethics & Standards of Practice, NAT’L ASS’N OF REALTORS (Jan. 1, 2021), <https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/2021-code-of-ethics-standards-of-practice>.

⁸¹ Consolidated Amended Class Action Complaint at 13, *Moehrl*, No. 1:19-cv-01610.

on the MLS via submission of a purchase offer.⁸² The plaintiffs in *Moehrl* contend that if buyer-brokers want to reduce their commissions, these rules make it so that the buyer-brokers must negotiate such request before showing the property to the buyer.⁸³ Consequently, these rules can place restrictions on negotiations that could lead to agreements that would save consumers money.

e. Modernization and Technology

Lastly, real estate commission rules should be changed because, simply, times have changed. The historical roots of current real estate structures are based on in the concept of subagency. Buyer-brokers used to owe obligations to the seller, so they were paid by the seller.⁸⁴ Because buyer-brokers now owe duties to the buyer and *not* the seller and are *still* paid by the seller, it seems as if the real estate industry has not adapted its rules to the roles. Proponents of reform and the plaintiffs in *Moehrl* assert that NAR and major real estate brokerages conspire to uphold the current structure to keep commissions at a supracompetitive level and “impede lower-priced competition.”⁸⁵

Moreover, as technology has adapted, so should the commission rules. A survey found that “80 percent of home buyers used the Internet during their home search in 2006, and 24 percent of home buyers in 2006 first located the home they bought on the Internet.”⁸⁶ This is a dramatic increase from the two percent of home buyers who had first located their home on the internet in 1997.⁸⁷ With many buyers now finding their homes online, many argue that the services of real estate agents are lessened, and real estate agents’ commissions should therefore lessen. Yet, the United States had the third highest commission percentage for real estate commissions (third to Mexico and Japan) in 2015 at 5.5%.⁸⁸ The significant majority of countries make the buyer pay some portion of the commission. Most countries’ average commissions are around 1.5–2%.⁸⁹ This includes countries like Sweden (1.5%), Singapore (1.5%), and China (2%).⁹⁰ Finally, technology has caused services to be cheaper in various major

⁸² *Id.* at 12-13; See NAT’L ASS’N OF REALTORS *supra* note 67.

⁸³ Consolidated Amended Class Action Complaint at 12-13, *Moehrl*, No. 1:19-cv-01610.

⁸⁴ Matt Carter, *From Subagency to Non-Agency: A History*, INMAN (Feb. 17, 2012), <https://www.inman.com/2012/02/17/from-subagency-non-agency-a-history/>.

⁸⁵ Consolidated Amended Class Action Complaint at 6, *Moehrl*, No. 1:19-cv-01610.

⁸⁶ U.S. DEP’T OF JUST. & F.T.C., *supra* note 67 at 1.

⁸⁷ *Id.*

⁸⁸ *Real-Estate Agent Commissions Around the World*, THE WALL STREET JOURNAL (date accessed Oct. 23, 2020 https://graphics.wsj.com/table/commish_1016).

⁸⁹ *Id.*

⁹⁰ *Id.*

industries to the benefit of the customers. For example, commissions paid to stockbrokers and travel agents have decreased by more than fifty percent since 1995.⁹¹ It is perplexing that the real estate industry has taken the opposite actions—or *inactions*. Thus, many people support adopting rules to adapt commission structures to the modern real estate industry.

V. ARGUMENTS FOR WHY THE COMMISSION RULES SHOULD BE UPHELD

Broker commission structures have been upheld after challenges in the courts, and this is because there are also various procompetitive, economic, and equitable reasons for keeping commission rules as they currently are.

a. *Antitrust*

Now that the anticompetitive effects of the Buyer–Broker Commission Rule have been analyzed, the procompetitive effects should be considered. Challengers of the Buyer–Broker Commission Rule, including the plaintiffs in *Moehrl*, perhaps take its restraints too far, when actually, all it requires is that when listing a property on the MLS, the seller–broker makes an offer of cooperation and compensation to a buyer–broker who finds a buyer for the respective property on the MLS.⁹² This offer is freely determined by the seller and is not fixed and can be any nominal amount.⁹³ Also, under the Antitrust Compliance Policy of NAR Handbook, realtors and the MLS cannot “fix, control, recommend, or suggest the commissions or fees charged for real estate brokerage services.”⁹⁴ This requirement of an offer, however, does *not* impede buyers from paying their brokers’ commissions for their services rendered.⁹⁵ As previously discussed, the seller–broker can make a commission offer on

⁹¹ George Jackson, *Combating the Moral Hazard Problem in Real Estate Agencies: The Case for Double Down Buyer Broker Clauses*, 43 REAL ESTATE REV. J. 1(2014).

⁹² 2021 Code of Ethics & Standards of Practice, NAT’L ASS’N OF REALTORS (Jan. 1, 2021), <https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/2021-code-of-ethics-standards-of-practice>.; Brief in Support of the Motion of the Defendant to Dismiss the Consolidated Amended Complaint at 1-2, *Moehrl v. Nat’l Ass’n of Realtors*, No. 1:19-cv-01610, 2019 WL 11753653 (N.D. Ill. Aug. 9, 2019).

⁹³ Brief in Support of the Motion of the Defendant to Dismiss the Consolidated Amended Complaint at 17-18, *Moehrl v. Nat’l Ass’n of Realtors*, No. 1:19-cv-01610, 2019 WL 11753653 (N.D. Ill. Aug. 9, 2019).

⁹⁴ *Policies: MLS Antitrust Compliance Policy*, NAT’L ASS’N OF REALTORS, (Jan. 1, 2021), <https://www.nar.realtor/handbook-on-multiple-listing-policy/policies-mls-antitrust-compliance-policy>.

⁹⁵ See *Moehrl supra* note 93, at 16.

the MLS for one penny, and instead, the buyer can agree to pay the buyer–broker.⁹⁶ Although an offer of a penny seems unlikely considering the average broker commission in 2019 was 5.7% of the sales price, this rule itself is not anticompetitive because it is allowing for buyer–brokers to be compensated by the buyers.⁹⁷ In fact, many argue it is procompetitive because of the market forces that drive sellers to make competitive offers of commissions to the buyer–brokers in order to find a buyer and buyer–broker ready, willing, and able to purchase the seller’s property.⁹⁸ The plaintiffs in *Moehrl* also make the viable argument that eliminating the Buyer–Broker Commission Rule will not force buyer–brokers to be paid by the buyer; instead, it would just make it optional for the seller–broker to include the offer of compensation on the respective MLS.⁹⁹ Therefore, even with the option to not make an offer to the buyer–brokers, the seller can still offer whatever commission he or she deems necessary to sell his or her home.

b. Inflated Commissions

The commission rules should not be changed because they arguably, as the defendants in *Moehrl* contend, do not cause the high value of real estate commissions seen in the United States. NAR rules for the MLS simply make available a price that can be negotiated to MLS users. This “practice of exchanging information concerning commission rates and the division of those commissions is insufficient evidence to support . . . claim[s] of pricefixing . . . or to demonstrate that an agreement or combination existed to fix brokerage commission rates.”¹⁰⁰

Also, many proponents of changing the commission structures, even the plaintiffs in *Moehrl* as seen in their original complaint, allege that buyer–brokers are allowed to advertise their services as free, which causes the price of commissions to be inflated to the seller because the buyer has no motivation to reduce the buyer–broker commission—so the buyer might think.¹⁰¹ However, the argument that buyer–brokers can represent their services as free is not true.¹⁰² NAR’s Code of Ethics Standard 12–2

⁹⁶ *Id.*

⁹⁷ STATISTA, *supra* note 14.

⁹⁸ *See Moehrl supra* note 93, at 17.

⁹⁹ *Id.*

¹⁰⁰ *Murphy v. Alpha Realty*, No. 76 C 2446, 1978 WL 1451, at *4 (N.D. Ill. Dec. 7, 1978); 2240 pg 15

¹⁰¹ Consolidated Amended Class Action Complaint at 11, *Moehrl*, 492 F. Supp. 3d (2019) (No. 1:19-cv-01610).

¹⁰² 2020 *Summary of Key Professional Standards Changes*, NAT’L ASS’N OF REALTORS (Jan. 1, 2020), <https://www.nar.realtor/about-nar/policies/2020-summary-of-key-professional-standards-changes>.

that allowed buyer-brokers to represent their services as “free,” was deleted as of January 2020 and amended as follows:

Unless they are receiving no compensation from any source for their time or services, REALTORS® may use the term ‘free’ and similar terms in their advertising and in other representations provided that all terms governing availability of the offered product or service are clearly disclosed at the same time only if they clearly and conspicuously disclose: by whom they are being, or expect to be, paid; the amount of the payment or anticipated payment; any conditions associated with the payment, offered product, or service; and any other terms relating to their compensation.¹⁰³

c. Steering

Furthermore, the defendants in *Moehrl* claim that the plaintiffs’ characterization that the Buyer-Broker Commission Rule encourages buyer-brokers to “steer” home buyers towards listings that offer higher commissions is a “pejorative characterization [that] overlooks the fact that the commission offered to buyers brokers in any given transaction is set by the home-seller in consultation with the listing broker.”¹⁰⁴ Furthermore, the defendants contend that the “[p]laintiffs’ claim of ‘steering’ amounts to nothing more than a claim that many home-sellers attempt to encourage buyer-broker cooperation by offering favorable commission terms to them.”¹⁰⁵ Thus, proponents of upholding the current commission structures argue that rather than characterizing the theory of sellers offering high commissions to entice buyer-brokers to show buyers their properties as “steering,” this is simply the free market at work and should be characterized as an anticompetitive strategy to sell one’s home.¹⁰⁶

The defendants in *Moehrl* raise another argument to support that steering is not prevalent due to the Buyer-Broker Commission Rule. Again, the plaintiffs allege that because many buyers find the property they purchase on their own with the help of real estate websites, buyer-brokers’ services are at too inflated of a price for the provided services.¹⁰⁷ Yet, if so many buyers are finding property on their own, how is steering

¹⁰³ *Id.*

¹⁰⁴ *Moehrl supra* note 93, at 2.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 14 (“Plaintiffs cannot transform this market dynamic into an unlawful restraint simply by using a pejorative antitrust buzzword to describe it.”).

¹⁰⁷ *Id.* at 15-16.

such a prevalent issue that the plaintiffs project?¹⁰⁸ This argument is quite contradictory.

Moreover, steering is against all brokers' fiduciary duties they owe to their clients. Under the fiduciary duty, brokers must uphold to the duty of loyalty.¹⁰⁹ This means brokers must put their clients first and operate in the best interests solely for the client.¹¹⁰ If a buyer-broker is putting his or her desire of receiving a higher commission before his or her client's needs, that is a violation of the buyer-broker's duties owed to the client.¹¹¹

d. Negotiation

Next, NAR and major real estate brokerages contend that the rules they enforce and follow do not impede negotiation, and the arguments in support of this view are compelling. Again, buyer-brokers can be paid by the buyer and given a de minimis compensation from the seller, so if the seller does not want to pay the buyer-broker, then that is certainly negotiable, and the seller effectively starts the negotiation by deciding what commission to offer on the MLS.¹¹² Accordingly, NAR rules do not prohibit the seller-broker and the seller from negotiating what the offered commission should be.¹¹³ This is procompetitive because the seller-brokers are competing for the client, incentivizing lower commissions. Also, the rules do not prevent the buyer-broker and the buyer from negotiating for the buyer to compensate the buyer-broker.¹¹⁴ This is especially advantageous if the commission the seller offers is inadequate.¹¹⁵ Moreover, NAR rules do not prevent the buyer-broker and the seller-broker from negotiating the commission even though they cannot unilaterally change the terms of their commission, and many times,

¹⁰⁸ *See Id.*

¹⁰⁹ *See Fiduciary Duties*, NAT'L ASS'N OF REALTORS (May 15, 2013), <https://www.nar.realtor/sites/default/files/handouts-and-brochures/2014/nar-fiduciary-duty-032213.pdf>.

¹¹⁰ Robert Reffkin, *Opinion: Broker's Fiduciary Duty Means Putting Clients First*, INMAN, (Jun. 23, 2015), <https://www.inman.com/2015/06/23/opinion-the-brokers-fiduciary-duty-means-putting-clients-first/>.

¹¹¹ *See Your Real Estate Agent's Fiduciary Duties*, DEEDS.COM (Oct. 30, 2020), <https://www.deeds.com/articles/your-real-estate-agents-fiduciary-duties/>.

¹¹² *Moehrl supra* note 93, 17-18.

¹¹³ *See generally Moehrl supra* note 93 at.

¹¹⁴ *See generally Code of Ethics and Standards of Practice of the National Association of Realtors*, NATIONAL ASSOCIATION OF REALTORS (2021), <https://cdn.nar.realtor/sites/default/files/documents/2021-02-09-COE-PDF.pdf>.

¹¹⁵ *See Moehrl supra* note 93, at 20-21.

the buyer–broker and seller–broker will negotiate their commissions for the sake of closing the deal.¹¹⁶

Additionally, the plaintiffs in *Moehrl* use NAR’s Standard of Practice against themselves. This Standard of Practice states the following:

REALTORS®, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker’s offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker’s agreement to modify the offer of compensation.¹¹⁷

Proponents of reform assert that this standard prohibits the buyer and seller from negotiating the commission, when in actuality, this limits the buyer–brokers from “employing a tactic that could jeopardize a home sale (and their client’s interests), *i.e.* conditioning submission of a purchase offer on the listing broker’s agreement to increase the compensation offered to the buyer’s broker.”¹¹⁸ This rule upholds the buyer–broker’s fiduciary obligation because it ensures that a buyer–broker cannot withhold a buyer’s offer until the seller–broker agrees to, for example, increase the buyer–broker’s commission.¹¹⁹ The seller and the buyer can negotiate the commission at any time, and the buyer–broker can negotiate the commission before the purchase offer is submitted.¹²⁰

Katie Johnson, who is general counsel and chief member experience member for NAR, stated that the lawsuits challenging NAR’s rules are “wrong on the facts, wrong on the economics, and wrong on the law.”¹²¹ She supports this by affirming that commissions are negotiable and, in fact, can be negotiated at any point during the transaction.¹²² Further, Katie

¹¹⁶ See *Id.* at 1; see Margaret Heidenry, *How to Negotiate a Real Estate Agent Commission*, REALTOR.COM (Apr. 17, 2017), <https://www.realtor.com/advice/sell/how-to-negotiate-a-realtor-commission/>.

¹¹⁷ 2021 Code of Ethics & Standards of Practice, NAT’L ASS’N OF REALTORS at 3 (Jan. 1, 2021), <https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/2021-code-of-ethics-standards-of-practice>.

¹¹⁸ *Moehrl*, 2019 WL 11753653 at *7-8.

¹¹⁹ *Id.* at 18-19.

¹²⁰ See generally 2021 Code of Ethics & Standards of Practice, NAT’L ASS’N OF REALTORS (Jan. 1, 2021), <https://www.nar.realtor/about-nar/governing-documents/code-of-ethics/2021-code-of-ethics-standards-of-practice>; See *Moehrl supra* note 93, at 8.

¹²¹ Katie Johnson, *Status Update for Moehrl v. NAR Litigation*, ATLANTA REALTORS (Oct. 8, 2020), <https://www.atlantarealtors.com/resources/news/detail/status-update-for-moehrl-v-nar-litigation>.

¹²² *Id.*

Johnson claims that “[o]ver 100 years, the courts have repeatedly validated this pro-competitive, pro-consumer MLS system, recognizing it increases the efficiency of the market and thus serves the best interests of sellers and buyers alike.”¹²³

e. Modernization and Technology

Lastly, the development of technology, such as the MLS, arguably has only benefited the current structure of commissions. NAR and many real estate agents believe that the MLS service benefits seller-brokers and buyer-brokers because it gives them access to a central market for real estate transactions.¹²⁴ The MLS creates efficiencies in the real estate market because it gives participating brokers the same access to information about the listed properties, which benefits the customers, and it encourages cooperation among brokers by incentivizing MLS participants to find buyers for the listed properties.¹²⁵ NAR rules enforcing these efficiencies have been upheld in courts.¹²⁶ In a statement, NAR said the MLS system helps to streamline real estate searches, and Mantill Williams, the Vice President of Communications for NAR stated the following: “The pro-consumer, pro-competitive MLS system creates a competitive market for buyers and sellers and has been upheld by courts many times over.”¹²⁷

VI. WHAT SHOULD THE OUTCOME SHOULD BE?

a. Current Commission Rules Should Be Upheld

The reasonings made for and against reform to the Buyer-Broker Commission Rule are both compelling, making it difficult for one side to outweigh the other when determining what is more valid both legally and equitably. Yet, this Comment agrees with NAR and major brokerages and

¹²³ *Id.*

¹²⁴ See Erxleben, *supra* note 42, at 184.

¹²⁵ Moehrl *supra* note 93, at 4-5.

¹²⁶ Top Agent Network, Inc. v. Nat’l Ass’n of Realtors, No. 20-cv-03198-VC, 2020 U.S. Dist. LEXIS 125623, at *2-3 (N.D. Cal. July 16, 2020) (finding NAR rule requiring brokers who join NAR-affiliated listing service to post properties they have marketed elsewhere onto NAR database within one day is fair under antitrust law because “[i]t is far more likely that the policy benefits buyers and sellers by increasing access to information about the housing market, thus increasing market efficiency and stimulating competition.”).

¹²⁷ E.B. Solomont, *A Trifecta! NAR Sued Again Over Buyer-Broker Commissions*, THE REAL DEAL (June 8, 2020), <https://therealdeal.com/2020/06/08/a-trifecta-nar-sued-again-over-buyer-broker-commissions/>.

their arguments, finding that the current real estate commission rules should not be found in violation of antitrust law and are economically equitable for both consumers and the industry, even in an age with emerging technology.

i. Antitrust

Current real estate commissions rules should not be found in violation of antitrust law because they provide consumers with various services and fee models to choose from among numerous brokers, which leads to a procompetitive market for broker services and fair and freely negotiated commission levels.

One of these procompetitive commission structures allowed under NAR that consumers have the choice of utilizing is the flat fee.¹²⁸ A real estate agent can charge a seller, for example, a \$1,000 charge to list his or her property. For example, on FlatFee.com, one can find the following:

Traditional full service real estate Brokers charge a 6% commission to list a property on the MLS. It is usual that 3% is for the listing Broker and 3% for the buyer's agent. A listing commission may be negotiated up or down as well as the buyer's agent commission. FlatFee.com simply charges a one-time flat fee of \$95 for a basic 6 month 6 photo Florida Flat Fee MLS Listing. We have photo upgrade options for \$125 and \$175. You save the traditional 3% listing commission. Of course, remember, you still must offer and pay a buyer's agent commission at the time of closing.¹²⁹

To further promote procompetitive practices, properties with flat fee arrangements are still allowed on a MLS, so consumers who choose flat fees will not be unreasonably restrained in the real estate market.¹³⁰ This commission structure provides competition to the traditional percentage commission structure, providing consumers more opportunities to sell their home the way they desire.

¹²⁸ *Commission/Cooperative Compensation Offers*, *supra* note 21.

¹²⁹ *Florida Flat Fee MLS Listing*, FLATFEE.COM, <https://www.flatfee.com/page/flat-fee-mls-listing>.

¹³⁰ *See Frequently Asked Flat Fee MLS Listing Questions*, FLATFEE.COM, <https://www.flatfee.com/page/faqs>.

Another method that that a consumer can utilize is the discount broker.¹³¹ For example, in Minneapolis the traditional brokerage fees are as high as 6% of the sales price.¹³² The average buyer–broker’s fee is often as low as 3.30%.¹³³ Therefore, the average seller–broker makes more in fees than the average buyer–broker.¹³⁴

Additionally, there is the option of buyer commission rebates.¹³⁵ These involve real estate agents who advertise that if a buyer hires him or her to buy a home, the brokerage will credit the buyer a percentage of its commission or a flat–fee at closing.¹³⁶ This money comes from the fee the seller pays the buyer–broker.¹³⁷ Generally, a brokerage that elects to give away part of its commission to buyers does so in the hopes that it will attract such a large amount of business that it is worth it financially to give rebates.¹³⁸

There is also the option of a seller selling his or her home as for sale by owner, where he or she pays no broker fees. Lastly, another procompetitive commission structure is a small percentage–fee listing.¹³⁹ This is where some brokers advertise that they will take a listing for 1% or 2%.¹⁴⁰

All of these methods indicate that there is not one mandatory commission structure for buyers and sellers in the real estate industry. Buyers and sellers might be willing to accept reduced services for a cheaper cost.¹⁴¹ It is not in violation of antitrust law that reduced services come at reduced cost. The primary motivation for having reduced services is to save money.¹⁴² Some sellers are extremely savvy about selling their own homes and do not believe they need a full–fledged marketing campaign.¹⁴³ Most importantly, real estate commissions are not set, so although sellers traditionally offer high real estate commissions to buyer–brokers, the sellers choose this high amount because they want to attract

¹³¹ See Elizabeth Weintraub, *Can You Save Money With a Discount Real Estate Broker*, THE BALANCE (Mar. 14, 2021), <https://www.thebalance.com/discount-real-estate-brokers-can-you-save-money-1798893>.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

demand for their property.¹⁴⁴ Instead, they are negotiable, which is compliant with antitrust law.

ii. Inflation

Next, this Comment supports the contention that the commission rules in the United States do not inflate the costs of commissions for consumers. By having various pricing models and services, all providers compete for the business of clients, which stabilizes prices, and consumers can acquire the services they demand. The plaintiffs in *Moehrl* contend that commissions have increased to an inflated amount recently because home prices have dramatically increased.¹⁴⁵ Yet, are commissions supposed to be less when the market is doing well? This is a perplexing argument. The success of real estate agents is a product of the market, so when the market does well, agents usually do well, and when the market does poorly, agents usually do poorly.

Commissions are arguably not inflated for the brokers when looking at the income relative to the number of hours worked per week, especially when factoring in the costs that real estate agents spend on advertising to generate leads. The average yearly income of a real estate agent in the United States is \$42,183, and those in the ninetieth percentile earn an average of \$64,101 as of February 2020.¹⁴⁶ However, in 2017, at least thirty-six percent of real estate agents spend at least \$5,000 annually on

¹⁴⁴ Ference, *supra* note 11.

¹⁴⁵ Consolidated Amended Class Action Complaint at 8-9, *Moehrl, v. National Ass'n of Realtors*, Civil Action No. 1:19-cv-01610 (N.D. Ill. Jun. 14, 2019) (“Moreover, because housing prices have increased substantially during this period (at a rate significantly exceeding inflation), and commissions are charged on a percentage of a home’s sale price, the actual dollar commissions imposed on home sellers ‘increased substantially because housing prices were much higher For example, between 2001 and 2017, the average price of new homes in current dollars sold rose from \$213,200 to \$384,900, according to U.S. Census Bureau Statistics.’ As the Consumer Federation of America has observed, ‘[b]ecause the industry functions as a cartel, it is able to overcharge consumers tens of billions of dollars a year Consumers are increasingly wondering why they are often charged more to sell a home than to purchase a new car.’”) (citing Brobeck, *Comments of Stephen Brobeck, Executive Director Consumer Federation of America Before the Department of Justice-Federal Trade Commission Public Workshop on Competition Issues*, CONSUMER FEDERATION OF AMERICA, 2 n.4 (2018)), <https://consumerfed.org/wp-content/uploads/2018/06/CFA-comments-DOJ-FTCpublic-workshop-on-competition-issues.pdf>; Glen Justice, *Lobbying to Sell Your House*, N.Y. TIMES (Jan. 12, 2006), <https://www.nytimes.com/2006/01/12/business/lobbying-to-sell-your-house.html>).

¹⁴⁶ Weintraub, *supra* note 131; *How Much Does a Real Estate Agent Make Per Sale*, CITYLOCAL 101 (January 07, 2021), <https://citylocal101.com/blog/how-much-does-a-real-estate-agent-make-per-sale>.

marketing expenses.¹⁴⁷ Three percent of real estate agents even spend at least \$80,000 annually on advertising.¹⁴⁸ Also, the nature of the real estate industry is that not all deals lead to closings, so often times, real estate agents are not getting compensated for their work. This shows that real estate agents are not actually netting highly inflated amounts of income, and commissions are, in fact, not unreasonably high.

iii. Steering

Steering is against a broker's duties as an agent owed to its principal because it puts the broker's interests before the client's interests.¹⁴⁹ Thus, an argument relying on steering is an argument relying on brokers committing violations of a fiduciary duty.

iv. Negotiation

As previously stated, broker commissions can be negotiated between various parties, including the brokers to a transaction. NAR rules encourage various means of negotiation in order to compensate the brokers in accordance with procompetitive means. The various means of broker compensation also add to the fact that buyers and sellers are able to negotiate virtually any deal they desire without NAR restrictions impeding the deal.

v. Modernization and Technology

Most real estate brokers utilize technology as a means of attracting clients. A study by Real Estate Webmasters found that seventy percent of real estate professionals use website advertising, and one in four real estate professionals said they wanted to invest more in marketing on web platforms.¹⁵⁰ Various studies have concluded that the use of computer technology and the internet have improved the productivity and profit margins of brokers.¹⁵¹ Although the traditional brokerage model remains dominant, new technologies have allowed "innovative real estate brokers to reduce costs and develop new services and offerings."¹⁵² This

¹⁴⁷ Tracy Velt, *How Much Do REALTORS Spend on Marketing Tools in 2018?*, REAL TRENDS (Apr. 3, 2018, 7:27 PM), <https://www.realtrends.com/blog/realtor-marketing-tools>.

¹⁴⁸ *Id.*

¹⁴⁹ Kimmons, *supra* note 8.

¹⁵⁰ Velt, *supra* note 147.

¹⁵¹ See Erxleben, *supra* note 42.

¹⁵² Maureen K. Ohlhausen, *Competition Issues in Real Estate Brokerage*, ANTITRUST SOURCE, Nov. 2005, at 1, 2.

development expands consumer choice.¹⁵³ The internet can deliver brokerage services more efficiently to customers, resulting in better service for those customers who prefer to perform some tasks themselves. It can also lead to lower prices for consumers, often through rebates of part of the buyer–broker’s commission.¹⁵⁴

Additionally, changing the commission structure to require buyers to compensate buyer–brokers would discourage buyers from obtaining the services and representation of a real estate professional. If buyers know that they have to pay a broker around three percent in commission (hypothetically speaking), buyers will be discouraged from paying for a service when they can do the bulk of the work on the Internet. Most buyers, however, are unaware of what they do not know. In other words, they do not adequately know how to protect themselves.

Lastly, NAR–associated MLS does create efficiencies by giving access to property information to all participating brokers.¹⁵⁵ Just because offers of compensation can now be displayed on the internet does not mean that the commission rules should be altered. The MLS fosters an environment of negotiation by attracting buyer–brokers and buyers.

b. What Is the Impact if the Rules Are Changed?

For the implications, there is a risk that if buyers have to pay broker fees, less buyers will use real estate agents. This could significantly adversely affect the real estate industry, as many agents specialize as being “buyer’s agents.” Also, this could harm buyers because they are not getting the assistance of a licensed professional. Some industry professionals predicted that such an arrangement would result in more dual agency deals, leading to fiduciary implications, or transactions in which buyers are unrepresented, which would subsequently lead to more lawsuits.¹⁵⁶

Everyone knows the saying “Don’t always believe what you see on the internet.” Well, this is true for real estate on the internet, too. Thus, if buyers are relying on information they find on the internet, such as property estimates, they can end up paying too much for their property. Even the CEO of Zillow, Spencer Rascoff, sold his home for much less

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Consolidated Amended Class Action Complaint, *Moehrl v. National Ass’n of Realtors*, Civil Action No. 1:19-cv-01610 (N.D. Ill. Jun. 14, 2019) at 4-5.

¹⁵⁶ Darryl Davis, *Commentary: The Ridiculousness of NAR Antitrust Lawsuit*, RISMEDIA, <https://rismedia.com/2019/08/18/ridiculousness-nar-antitrust-lawsuit/> (last visited Oct. 23, 2020).

than it was valued at on Zillow.¹⁵⁷ If not even the Zillow CEO sells his home at the price that Zillow estimates it is worth, who is to trust Zillow's "Zestimates"?¹⁵⁸ Hence, consumers need an expert to assist them.

NAR contends that if the proponents of rescission of the Buyer–Broker Commission Rule get their way, the impact could be “disastrous” for buyers and sellers.¹⁵⁹ NAR supports that local expert brokers play a crucial role in assisting buyers and sellers achieve their real estate goals.¹⁶⁰ These roles include helping buyers navigate the complexities of a real estate transaction, scheduling home tours and inspections, coordinating with lenders and appraisers, and coordinating attorney reviews and closing documents.¹⁶¹ Seventy–eight percent of buyers say their broker was an important information source, and almost ninety percent would recommend their broker to a family member or friend.¹⁶²

Furthermore, Christopher Dean, director of operations and marketing at The Monica Foster Team at eXp Realty, is concerned about buyers being able to pay buyer–broker commissions in the first place: “Buyers cannot afford their down payment and closing costs now, do you think they are going to tack on a commission to the buyer’s agent? Many don’t even put any value on a buyer’s agent (with good reason in many cases).”¹⁶³

Darryl Davis has spoken to, trained, and coached more than 100,000 real estate professionals around the globe.¹⁶⁴ He comments the following on why he supports upholding the current structure of real estate broker commissions as they are:

If you really want to look at conspiracy stuff, turn the table on this legal lens and look at attorney practices. According to the American Bar Association website, attorneys traditionally get paid one of two ways: They can charge an hourly rate or a contingency fee—which is essentially a commission—based on an amount won in a lawsuit. Here’s what their site says: ‘In a contingent fee

¹⁵⁷ Teke Wiggin, *Zillow CEO Spencer Rascoff sold home for much less than Zestimate*, INMAN (May 18, 2016), <https://www.inman.com/2016/05/18/zillow-ceo-spencer-rascoff-sold-home-for-much-less-than-zestimate/>.

¹⁵⁸ *Id.*

¹⁵⁹ Andrea V. Brambila, *NAR: Commission lawsuits could be ‘disastrous’ for both buyers and sellers*, INMAN (July 26, 2021), <https://www.inman.com/2019/07/26/nar-commission-lawsuits-could-be-disastrous-for-both-buyers-and-sellers/>.

¹⁶⁰ *Status Update for Moehrl v. NAR Litigation*, *supra* note 121.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Brambila, *supra* note 38.

¹⁶⁴ Davis, *supra* note 156.

arrangement, the lawyer agrees to accept a fixed percentage, often one-third of the recovery.’ Essentially, they’re saying that attorneys who base fees on contingency charge 33 percent. So, if they want to look at the National Association of REALTORS® and whether or not they’re price-fixing fees, we should be looking at the American Bar Association and how attorneys are collectively charging 33 percent. I’m not saying they’re conspiring; I’m just stating what it says on their site.¹⁶⁵

This argument by Darryl Davis raises noteworthy considerations.¹⁶⁶ Any industry in which there is a standard percentage charged could be challenged as a violation of antitrust law. The major competitors in the area of business could be accused of commingling to conspire to increase the price and limit competition, just as the plaintiffs in *Moehrl* are accusing the defendants of doing.¹⁶⁷ For example, in the construction industry, there is essentially a universal ten percent charge for overhead. If the plaintiffs’ arguments in *Moehrl* were to succeed, the way many industries charge clients would have to change. Changing the standard in any of these industries will have major consequences, especially when real estate commission rules have been relatively consistent since the 1950s.

The contrary argument to this would be that unlike a law firm or construction company, which attract clients when they offer lower percentages to be charged, with the real estate broker commission structure, having a lower percent commission does just the opposite. As the plaintiffs in *Moehrl* argued, having a lower percentage commission listed on the MLS can cause buyer-brokers to not want to show their clients the properties with a lower commission because they will in turn receive a lower payment.¹⁶⁸ Thus, it is arguable that there are different theories behind why legal fees and construction fees are allowed to have a general industry rate for their services.

However, as previously explained, this is unethical for buyer-brokers to show clients properties based on the commissions under the agent’s fiduciary duty. Also, proving this behavior is another task. To support an antitrust violation, plaintiffs must particularly plead facts that prove that

¹⁶⁵ *Id.*

¹⁶⁶ *See id.*

¹⁶⁷ *See generally* *Moehrl v. Nat’l Ass’n of Realtors*, 492 F. Supp. 3d 768, 776-78 (N.D. Ill. 2020).

¹⁶⁸ *Class action cases over broker commissions pick up steam*, THE REAL DEAL (June 18, 2019), <https://therealdeal.com/national/2019/06/18/class-action-cases-over-broker-commissions-pick-up-steam/>.

this is happening in the real estate industry and that NAR and the other defendants are fostering this activity.

c. Should There Be Any Reforms?

Although this Comment argues that the current commission rules are legally sound, that does not mean no reform is warranted. Development in a world that is drastically changing due to technology is essential, especially when there have been various complaints (*and literal complaints*) against the real estate industry. Therefore, this Comment suggests that some reforms should be made to the real estate industry to better respect the desires of consumers while maintaining the regulations that support growth, success, and development in real estate.

First, many buyers request that they should have access to see the commission rates for properties. Although buyers can simply ask their broker what the commissions are on properties, giving buyers access to this information for themselves is a request that should be allowed and that should only benefit the real estate industry and home buyers by promoting transparency between the buyer and the buyer-broker. In fact, this change should be going into effect in the beginning of 2021.¹⁶⁹ The U.S. Department of Justice filed an antitrust suit against NAR that resulted in a settlement requiring NAR making some changes to its commission rules, including requiring MLSs to make commissions publicly available.¹⁷⁰

Another topic that has caused debate in the real estate industry is the ability to filter properties based on their commission offered on the MLS, which gives buyer-brokers the ability to send properties to their clients that are only above a certain commission. However, this was also included in the same settlement as the commission disclosure lawsuit brought on by the Department of Justice.¹⁷¹ According to the settlement, the MLS must eliminate the ability for buyer-brokers to filter properties based on their level of commission to the buyer-broker.¹⁷²

Lastly, rebates should be allowed in every state. As discussed previously, rebates are a procompetitive means that allow buyers to be

¹⁶⁹ Andrea Brambila, *MLS Brokerage Giants Hit with Commission Price-Fixing Lawsuit*, INMAN (Dec. 22, 2020) <https://www.inman.com/2020/12/22/mls-brokerage-giants-hit-with-commission-price-fixing-lawsuit/>.

¹⁷⁰ *Id.*

¹⁷¹ See *Justice Department Files Antitrust Case and Simultaneous Settlement Requiring National Association of Realtors® To Repeal and Modify Certain Anticompetitive Rules*, DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS (Nov. 19 2020), [https:// www.justice.gov/opa/pr/justice-department-files-antitrust-case-and-simultaneous-settlement-requiring-national](https://www.justice.gov/opa/pr/justice-department-files-antitrust-case-and-simultaneous-settlement-requiring-national).

¹⁷² *Id.*

compensated by the buyer–broker.¹⁷³ However, rebates are not allowed in every state even though they have procompetitive effects.¹⁷⁴ Rebates are currently allowed in forty states.¹⁷⁵ The opportunity for buyers to be able to use a rebate to close on a property should be an opportunity given universally.

VII. CONCLUSION

NAR’s fee structure for real estate broker commissions should be considered fair and legal under antitrust law because the rules do not force any specific fees, and they do allow fees to be negotiated. In the real estate industry, buyers and sellers are not forced to a single transaction method for compensating their brokers.¹⁷⁶ Everything in the contract is negotiable, although there are some NAR rules regulating the contract. There are also various options for compensation that sellers and buyers can exercise when selling and buying a home to attain competitively priced fees.

NAR fosters development in the real estate industry rather than discouraging competition. The recent lawsuits against NAR challenging real estate broker commission structures should fall in line with the decades–long precedent: the Buyer–Broker Commission Rule in the United States does not violate antitrust laws. A ruling holding that the Buyer–Broker Rule violates antitrust law could have major impacts on the real estate industry, not only for real estate agents, but also for home buyers and sellers.

Furthermore, the real estate industry is making use of the economic sources efficiently. In a world of evolving technology, real estate agents are using technology to advertise and broaden their network and clientele, and they are using resources like the MLS to expand their options for their clients.¹⁷⁷

As the real estate industry awaits for the day of drastic change regarding how half of real estate agents are compensated, scholars will continue to debate the benefits and costs of eliminating and upholding the Buyer–Broker Commission Rule. Although seller–brokers and the average American might think it is in their best interest to require commissions for the buyer–broker to be paid by the buyer, as this Comment debates, that

¹⁷³ Weintraub, *supra* note 131.

¹⁷⁴ *States That Prohibit Realtor Fee Negotiations*, CONSUMER ADVOCATES IN AMERICAN REAL ESTATE, <https://www.caare.org/statesthatprohibitfeenegotiations/> (last visited Jan. 10, 2020).

¹⁷⁵ *Id.*

¹⁷⁶ Weintraub, *supra* note 131.

¹⁷⁷ Ohlhausen, *supra* note 152.

might not be the best option for consumers and the real estate industry as a whole, and it is certainly not the only lawful option.